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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JESSIE BLAYLOCK, Defendant and Appellant.	C061159 (Super. Ct. No. 08F06592)

Following a jury trial, defendant Jessie Blaylock was convicted of receiving stolen property in violation of Penal Code section 496, subdivision (a). Sentenced to the low term of 16 months in state prison, defendant appeals his conviction. Defendant contends his Fifth Amendment right to remain silent was violated when the prosecution introduced evidence that he failed to return telephone calls from the police and argued defendant's silence was evidence of his guilt. We agree and shall reverse his conviction.

FACTUAL AND PROCEDURAL BACKGROUD

On June 16, 2008, Larry and Norma Jeannie Elgersma left home to visit their son in Lake Tahoe. They left their adult

daughter Karen at home with her friend, Sophie T. Prior to their trip, defendant, a friend of the family, offered to paint the exterior of the Elgersmas' home while they were away. The Elgersmas accepted the offer.

When the Elgersmas returned home on June 20, 2008, they found defendant inside the house and paid him for his work. Defendant took the money and left. Norma then went to the master bedroom to "put some stuff away." In the bedroom, Norma saw a smear of paint on the doorframe to Larry's closet. The paint was similar in color to that which defendant had just applied to the trim on the outside of the house. Concerned, Norma called to her husband.

Larry went inside the closet and opened the lock box defendant had given to him one year earlier. Larry noted the box was not locked, which was unusual, and discovered the key to his gun safe was no longer in the lock box. Larry contacted a locksmith to open the gun safe, but the cost was too high. Thus, the following morning, Larry used a drill to open it.

Inside the gun safe, Larry discovered that he was missing a Browning lever action .22-caliber rifle, his wedding band, a gold ring with three diamonds, and silver coins valued at "a couple of hundred dollars," including a film canister full of Mercury dimes. Larry immediately contacted the police. Larry also told his daughter Karen that he believed defendant had taken these items. Angry, Karen tried to call defendant, but he

would not take her calls, so she walked to his girlfriend's house a few blocks away.

When Karen arrived at defendant's girlfriend's house, defendant was not there, but his girlfriend and his friend David T. were. Karen spoke with defendant's girlfriend and told her about the missing items but she denied knowing anything. Later, David T. contacted Karen, telling her he may have information about the missing property. Karen directed the police to David.

The police spoke with David T., who recounted an incident with defendant that occurred around June 21, 2008, when David showed defendant his one-year chip from Narcotics Anonymous (N.A.). David remembered that, in response, defendant showed him a commemorative coin about the size of a silver dollar with a cowboy on it and two or three Mercury head dimes made of silver. David remembered the dimes were in a little bottle, though he could not remember the color, and that defendant said he paid $10 for them. David told defendant he had similar coins, that he "got them all the time."[1]

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[1] At trial, the following colloquy took place between defense counsel and David T., after David emptied his pockets trying to get to his three-year N.A. chip:

"Q. Sir, I notice you have Mercury head dimes in your pocket?

"A. Yes.

"Q. Where'd you get them?

"A. Out of my coin jar."

Defendant was arrested and charged with first degree residential burglary and possession of stolen property (to wit, coins). Defendant pleaded not guilty and the matter went to trial before a jury.

At trial, Larry explained that several types of coins were missing from his gun safe, including a coin or two "from a casino up in Tahoe," a film canister full of Mercury head dimes, about 100 Roosevelt dimes, and some other silver dollars and quarters. He described the film canister in which he kept the Mercury head dimes as 35-millimeter, "silver-colored with a yellow lid." He also testified that defendant had given him the lock box with a single key as a gift, and knew where the gun safe was.

The Elgersmas' daughter Karen testified that while her parents were gone, there were at least four other people in and out of the family home: defendant, his assistant "Rick," Karen's friend Sophie, and Michael S. Michael S. worked on the floor tile in the front bathroom for about half a day that week. When Michael was finished, however, he and Karen failed to properly seat the toilet on the wax ring, and they had to fix it again a few days later. Thus, Karen acknowledged that for at least some period of time while her parents were gone, the only functional bathroom in the house was in the master bedroom.

Karen also acknowledged that defendant and Rick were at the house all week painting, though they did not start painting the trim until after the tile work was completed. She also

testified that she twice left the house to buy paint, leaving the house unlocked both times. Karen further revealed that she was convicted of possessing stolen property and forgery in 2005, and false impersonation in 2006.

Galt Police Officer Juan Fuentes also testified at trial. He remembered that Larry described the missing items as a rifle, approximately three rings, and "uncirculated silver coins and several Mercury head silver dimes which were in a small black film container." Officer Fuentes was never told there may be fingerprints at the crime scene and no fingerprints were ever collected.

Officer Fuentes testified further about his investigation. He recalled David T. reporting that defendant showed him a silver dollar and Mercury head dimes in a black plastic film container. He also remembered making four attempts to talk to defendant, which defendant did not return; however, defendant did, ultimately, speak to Officer Fuentes in August 2008. During their conversation, defendant denied taking the coins from the Elgersmas, saying he had only shown David a silver dollar from the Jackson Rancheria and offered to sell it to him for $10.

Defendant did not testify. The jury subsequently found him not guilty on the charge of burglary, but guilty of receiving stolen goods. The court later sentenced defendant to the low term of 16 months in state prison and ordered him to pay various fines and fees. Defendant appeals.

DISCUSSION

Defendant contends his Fifth Amendment rights were violated when the prosecution used his prearrest silence as substantive evidence of his guilt. We agree.

The Fifth Amendment of the federal Constitution protects against self-incrimination. "'"[A]pplication of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime."'" (*People v. Waldie* (2009) 173 Cal.App.4th 358, 366 (*Waldie*), quoting *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 283.)

Here, in response to the prosecutor's questions, Officer Fuentes testified he left four messages for defendant that were not returned. Relying on this testimony in his closing argument, the prosecutor argued: "[Officer Fuentes] made multiple attempts to talk to [defendant]; they were unsuccessful. And finally he was able to track down [defendant] and get an interview with him."

The prosecutor pursued this line of argument further in his rebuttal:

"And, but one thing that we do know is that is consciousness of guilt. You are not even willing to talk to [the Elgersmas] on the telephone about what you may know about what happened when you were there painting the house. You are not even willing to go over there and talk to them once, even when the police say, 'Hey, we need to talk to you about this

theft.' You know, 'Please come talk to us, please return our calls.'

"You are not even willing to go through the police as a mediator then. Okay, you don't want to talk to the Elgersmas. You are so offended that they would actually think that you might be the thief. Okay, why don't you explain your position to the police and say, 'Let them know that is my position.' No, he avoids the police."

Such argument and evidence "deprive[] [defendant] of any meaningful right to refuse to talk to the police." (*Waldie, supra*, 173 Cal.App.4th at p. 366.) The People make no effort to distinguish *Waldie* from the present case. Nor do they make any argument that this court should follow the analysis of those federal circuit courts that have held the use of a defendant's prearrest silence may be used as substantive evidence of guilt. (See *United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1066-1067; see also *United States v. Zanabria* (5th Cir. 1996) 74 F.3d 590, 593; *United States v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1568.) Accordingly, we will not address the split in the federal courts other than to say that, in general, we agree with the decision in *Waldie.*

Consequently, we agree it was error to admit testimony from Officer Fuentes regarding defendant's failure to respond to the officer's requests, and to allow the prosecutor to argue that defendant's failure to respond to the police was evidence of his guilt.

Without meaningful analysis, the People contend any error was harmless beyond a reasonable doubt. "Under the *Chapman*[2] standard, an error is harmless if the record establishes beyond a reasonable doubt that the error did not contribute to the jury's guilty verdict. [Citations.] '"The question is whether there is a reasonable possibility that [the error] contributed to the conviction."' [Citation.] '"To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."'" (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 569.)

It is difficult to deem an error "unimportant" where, as here, the evidence in support of defendant's conviction was minimal. The jury found defendant guilty only of receiving stolen property. To support that conviction, the prosecution was required to prove beyond a reasonable doubt that defendant "received, concealed or withheld property that had been stolen," which defendant knew was stolen, and that defendant "knew of the presence of the property." (CALCRIM No. 1750.)

The only evidence to support a guilty verdict was the testimony that defendant had two or three Mercury head dimes and a commemorative coin about the size of a silver dollar in his possession shortly after the Elgersmas' coins were taken. However, there was no evidence that the coins in defendant's

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[2] *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].

possession were actually Larry Elgersma's. The prosecution could not even tie the container in which defendant kept the coins to the container missing from Larry's gun safe: Larry kept his Mercury head dimes in a silver 35-millimeter film canister with a yellow lid, but defendant's were in a black container.

Furthermore, there was no testimony at trial that Larry's Mercury head coins were particularly rare or unique. They were Mercury head coins which, according to Larry, were taken out of circulation in the 1960's along with all other silver coins. Nevertheless, Larry's coins did not have any identifying marks or attributes, and even David T. testified that he found Mercury dimes all the time--he found some in his coin jar at home. And as for the silver commemorative coin the size of a silver dollar with a cowboy head that defendant showed to David, there was no evidence that Larry even owned such a coin.

With such a paucity of evidence, we cannot say beyond a reasonable doubt that the constitutionally infirm argument made by the prosecution did not contribute to the verdict. Accordingly, we must reverse defendant's conviction.

Defendant also contends the evidence admitted at trial was insufficient to sustain his conviction. To be sure, the evidence admitted at trial in support of defendant's conviction was not overwhelming; it was not, however, insufficient to sustain his conviction.

In reviewing claims of insufficient evidence, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Here, we must also consider the evidence that was wrongly admitted. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34 [102 L.Ed.2d 265, 269-270].) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Lewis* (1990) 50 Cal.3d 262, 277.)

Defendant had access to the victims' home while they were on vacation. He knew about the stolen coins and the gun safe in which they were kept. Defendant also knew about the lock box where the victim housed the keys to the gun safe, and may have had his own key to the lock box. A smudge of the same paint defendant was using on the outside of the house was left on the door frame to the closet where the lock box was housed. Shortly after the burglary, defendant was seen with coins similar to those that were stolen. Defendant then avoided the police during their investigation.

The evidence is circumstantial, but we cannot say it was unreasonable for the jury to find defendant guilty of receiving stolen property. Notably, the jury was in a position to determine the credibility of the witnesses and observe the

defendant during trial. We are not. Accordingly, we find there is sufficient evidence to support defendant's conviction.

Given that we find there was sufficient evidence to sustain the conviction, the People are not precluded from retrying the case on remand if they so choose. (*People v. Mattson* (1990) 50 Cal.3d 826, 853, fn. 16 [where verdict reversed due to erroneous admission of the defendant's confession, double jeopardy did not prohibit retrial; "mere trial court error in the admission of evidence does not preclude retrial if, with the erroneously admitted evidence, there was sufficient evidence to support the . . . conviction"]; see also *People v. Venegas* (1998) 18 Cal.4th 47, 95 [erroneous admission of DNA evidence did not bar retrial since that evidence was sufficient to prove guilt beyond reasonable doubt].)

DISPOSITION

The judgment is reversed. The cause is remanded to the trial court for further proceedings consistent with this opinion.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.